Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses	)	MM Docket No. 97-234
	)	
Reexamination of the Policy Statement on Comparative Broadcast Hearings	)	GC Docket No. 92-52
	)	
Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases	)	GEN Docket No. 90-264

COMMENTS OF LINEAR RESEARCH ASSOCIATES

Linear Research Associates ("Linear"), by counsel, hereby submits its comments in response to the *Notice of Proposed Rulemaking*, FCC 97-397, released November 26, 1997 ("*NPRM*") in the captioned proceeding.[1]

INTRODUCTION

These Comments address the procedures the Commission should apply to pending applications filed prior to July 1, 1997 in cases where all of the *qualified* applicants have filed a settlement agreement with the FCC, as well as a motion to dismiss any unqualified applicant. The FCC should, in such cases, deem that a viable settlement has been reached, and act swiftly to dispose of the unqualified applicant. We demonstrate that such a rule (which we refer to as the "Viable Settlement Rule") follows from applicable principles governing proper agency action in this context. In particular, this rule will *(1)* further the FCC's statutory duty to act in the

[1] 62 Fed. Reg. 65392 (Dec. 12, 1997).

public interest and to implement the new rules in a rational way; and *(2)* comport with any due process considerations owed to parties with applications filed before July 1, 1997.

I. THE RULES AS PROPOSED IN THE NPRM.

1. *Illustrative Case.* A case that illustrates the critical need for the Viable Settlement Rule involves the applications of Linear and Kevin O'Kane ("O'Kane") for a permit to construct a television broadcast station to serve Ithaca, New York on Channel 52. William Smith ("Smith") also filed an application for the Channel 52 facility. Over 17 months ago -- on July 10, 1996 -- Linear and O'Kane filed a Joint Petition to Dismiss or Deny Smith's application, predicated on several fundamental defects that preclude grant of the Smith application.

Several months later, in December 1996, Linear and O'Kane filed a Joint Request for Approval of Settlement Agreement that contemplates the amendment of O'Kane's application to substitute as the Ithaca applicant, a corporation owned by O'Kane and Linear's owner, Curt Dunnam. The Settlement Agreement initially was contingent on the *dismissal* of the Linear *and Smith* applications, and the grant of O'Kane's application as amended. However, the parties have removed that contingency.

The pleadings that Linear and O'Kane have filed against Smith's application lay out in detail the egregious defects which necessitate the dismissal of the Smith application. For example, Smith certified reasonable assurance of the availability of his proposed antenna site when, in fact, the tower owner had given no such assurance. Two representatives of the tower owner executed declarations under penalty of perjury, stating in the most categorical terms that the tower owner had *not* given Smith any assurance as to the availability of the tower, and that neither Smith nor anyone acting on his behalf had inquired with the tower owner as to that

prospect. When Smith failed to provide any support for his certification, the petitioners moved for dismissal of Smith for failure to prosecute.

Significantly, Smith has never attempted to explain this false certification. His rejoinders to Linear's and O'Kane's pleadings have been limited solely to the imaginative claim that the objections do not lie as a procedural matter. Thus, as an issue of dispositive fact, there cannot be any genuine dispute that Smith's application is defective.[2]

2. *Scope of Section 309(l); Pre-July 1, 1997 Applications.* In the *NPRM*, the Commission tentatively proposes to use auctions to resolve pending initial licensing proceedings that are within the scope of 47 U.S.C. § 309(l). In the event the Commission uses auctions, new Section 309(l) provides that "the Commission shall . . . (2) treat the persons filing such applications [i.e. competing applications for initial licenses or construction permits for commercial radio or television stations that were filed with the Commission before July 1, 1997] as *the only persons eligible to be qualified bidders*." *NPRM* at ¶ 23 (emphasis added).

In the same section (¶¶ 23 - 35) the FCC considers "Rules and Procedures for Pending Comparative Licensing Cases," including "cases already designated for hearing." Where (i) a *settlement is not* filed, and (ii) the auction rules have become final, the Commission proposes that

> [T]he ALJ (or the General Counsel on delegated authority in cases pending before the Commission) would issue an order directing that the permittee is to be determined by comparative bidding procedures from among the pending applicants *eligible to participate* in the auction, and indicating *whether there are any unresolved questions as to a particular applicant's basic qualifications.* If not, the hearing proceeding would be terminated. In the event questions remain with respect to an applicant, the hearing will be resumed in the event that applicant is the winning bidder after the

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[2] This is not the only fatal problem with Smith's application. There is also compelling evidence that Smith is financially unqualified. *See*, Joint Petition to Dismiss or Deny of Linear and O'Kane, filed July 10, 1996, at 17-23.

> auction. . . .We recognize that deferring questions as to the pending applicants' basic qualifications may require that we conduct a second auction if the high bidder is ultimately found disqualified, and that there are few remaining hearing cases. Thus, we seek comment on whether it would be *more efficient to review the basic qualifications of the pending applicants prior* to the auction."

NPRM at ¶ 30 (emphasis added).

At Paragraph 37, the *NPRM* states:

> We do not propose to accept any petition to deny against a pending applicant prior to the auction. . . . The winning bidders' long-form applications would then be placed on public notice, thereby triggering the filing window for petitions to deny.

3. Although the *NPRM* offers this general procedural backdrop for pending cases, it does not address the circumstances in which a settlement proposal among *qualified applicants* has long since been filed with the Commission, and petitions documenting a defective applicant's lack of qualifications have also been filed. Where the pleadings establish that an applicant (such as Smith) lacks basic qualifications, the FCC should expeditiously grant the settlement and dispose of the unqualified applicant. Put differently, under no circumstances should the Commission permit an unqualified applicant to participate in an auction. Thus, the fact that the unqualified applicant has not been included in the settlement should not affect the validity of the settlement proposal. This is the thrust of the Viable Settlement Rule. We show below that the adoption of this rule is supported by all relevant criteria.

II. UNQUALIFIED APPLICANTS NEED NOT BE INCLUDED IN SETTLEMENTS AND SHOULD NOT BE PERMITTED TO PARTICIPATE IN AN AUCTION.

Creation of the Viable Settlement Rule is appropriate because *(A)* the rule will further the FCC's statutory duty to advance the public interest, 47 U.S.C. § 309(a), and to implement new

Section 309(l) in a rational way; and *(B)* the rule will comport with all requirements of due process.

A. The Viable Settlement Rule Will Further the Public Interest And Will Be Rational.

1. *Public Interest Considerations.* The "paramount" interest in administrative proceedings is that of the public, and the "interests of private litigants must give way to the realization of public purposes." *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958). Matters of licensee character and truthfulness -- plainly at issue in the case of an applicant such as Smith -- are at the heart of the FCC's regulatory duty to protect the public interest. *See, e.g., Richardson Broadcast Group*, 7 FCC Rcd 1583 (1992) (subsequent history omitted) ("It is well settled that the ability of the Commission to rely on representations of applicants and licensees is crucial to the functioning of our regulatory process").

As the Commission stressed in its *Character Policy Statement*, 102 FCC 2d 1179, 1210 (1986) (subsequent history omitted), the truthfulness of applicants, permittees and licensees directly affects the integrity of Commission's regulatory processes.

"[T]he trait of 'truthfulness' is one of the . . . key elements of character necessary to operate a broadcast station in the public interest," and the Commission may "treat even the most insignificant misrepresentations as disqualifying." *Ibid. See also Emission de Radio Balmeseda, Inc.*, 7 FCC Rcd 3852, 3858 (Rev. Bd.), *rev. denied*, 8 FCC Rcd 4335 (1993) ("The Commission's demand for absolute candor is itself all but absolute.") The Commission's Mass Media Bureau recently reiterated that even the failure to disclose required information, or provide "incomplete or incorrect information," can "raise a serious question as to whether the applicant

possesses the character qualifications to be a Commission licensee." *Liability of KCTZ Communications, Inc.*, DA 97-2320, released November 6, 1997 (MMB), *citing Policy Statement*, at 1210-11.

Obviously, the nexus between licensee truthfulness and the public interest would be broken if an unqualified applicant were deemed eligible to participate in an auction. Thus, there cannot be any genuine dispute that the Viable Settlement Rule would serve the public interest by promoting the long-settled principles discussed above.

The public interest would be served in another way. The Congress as well as the FCC have repeatedly determined that a virtue of auctions -- and *a fortiori*, a pre-auction settlement -- is more rapid delivery of new service to the public, one of the FCC's principal statutory objectives. *See, e.g., Marlin Broadcasting of Central Florida, Inc.*, 5 FCC Rcd 5751 (1990) (objective of providing communications service to the public in the most efficient, expeditious manner possible carries substantial weight in balancing analysis); *Sutton v. City of Milwaukee*, 672 F.2d 644, 645-46 (7th Cir. 1982). However, if an unqualified applicant were allowed to participate in an auction or to scuttle a pre-auction settlement among qualified applicants, this objective would be undermined, as we discuss in detail *infra*.

Moreover, the FCC's general competitive bidding rules provide that if the winning bidder is ultimately found to be unqualified to be a licensee, the Commission would conduct another auction for the license and this would require that it afford *new parties* an opportunity to file applications for the license. *See* 47 C.F.R. § 1.2109(c); NPRM at ¶ 69. This would be egregiously prejudicial to the other parties in the case, and would run counter to the Congressional directive relating to auctions among pre-July 1, 1997 applicants. To avoid the quagmire of that issue, the Commission should preclude applicants such as Smith from auction

participation. Alternatively, the Commission should establish that applicants who filed prior to July 1, 1997 should not be subject to auction participation by new parties.

2. *Rationality.* There can be little question but that the Viable Settlement Rule would satisfy the requirements of rationality. Clearly, excluding an unqualified applicant is reasonably related to the FCC's statutorily-imposed duty to act in the public interest. Again, the Ithaca case illustrates this point plainly. Smith is unqualified because, among other reasons, he falsely certified that he had reasonable assurance of his proposed antenna site. That is a straightforward issue of fact, wholly substantiated by two sworn declarations from representatives of the tower owner, declarations to which Smith offered no rebuttal. In the unlikely event that the FCC's dismissal of Smith's application were appealed, the relevant standard of review would be the exceedingly stringent "abuse of discretion" standard, 5 U.S.C. §706(2)(A), which Smith could not possibly meet.

The Viable Settlement Rule would thus pass judicial review under such governing precedents as *NLRB v. Food and Commercial Workers*, 484 U.S. 112, 123 (1987) (agency given deference "as long as its interpretation is rational and consistent with statute"); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (agency regulations given deference "unless they are arbitrary, capricious, or manifestly contrary to the statute); *see also E.E.O.C. v. Commercial Office Products Co.*, 486 U.S. 107 (1988).

Congress did not specifically address the matter of the eligibility of parties we have here described as "unqualified." Therefore,the FCC has substantial latitude to promulgate a reasonable rule. *See Smiley v. Citibank, N.A.*, 116 S.Ct. 1730, 1733 (1996).

As shown above, the Viable Settlement Rule would promote the public interest and at the same time satisfy the requirements of rationality. Accordingly, the only reason the Commission

might pause before adopting it could be a countervailing concern that an unqualified applicant's due process rights would be compromised if it were denied the privilege of participating in an auction. As shown below, no such concern should stand in the way of adoption of the suggested rule.

B. Due Process Considerations.

Under the familiar test of *Mathews v. Eldridge*, the question whether a rule denying an unqualified applicant the privilege of participating in an auction turns on (1) the nature of the private interest at stake and the risk of an erroneous deprivation of that interest through the procedure used; and (2) the nature of the Government's interest. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

1. *The Nature of an unqualified applicant's interest in participating in an auction; the risk of deprivation of any such interest by adoption of the Viable Settlement Rule.* Here, of course, the threshold question is whether an unqualified broadcast applicant has *any* cognizable interest that requires special protection. It does not. As the FCC correctly observes in the *NPRM*, its authority to adopt a new rule does not depend on an applicant's expectations, but on whether the rule is arbitrary or capricious. *See NPRM* at ¶ 14, citing *DIRECTV v. FCC*, 110 F.3d 816, 825-26 (D.C. Cir. 1997). *See also*, our previous discussion in Section II(A)(2) *supra*. Thus, an unqualified applicant would not have a viable due process claim that a constitutionally-protected interest lay in its expectation of the ability to participate in the auction.

Moreover, considering the bases for Smith's disqualification, which bear so fundamentally on truthfulness and reliability (not to mention the lack of the technical integrity of his proposal), it strains reason to think that a false certification would not *eo ipso* render Smith ineligible for participation in the auction. Of course, there is always the *theoretical* possibility that Smith could

successfully appeal the dismissal of his application. But this does not in any way enlarge Smith's protectable interest, for two reasons.

First, as discussed above, there is no material question of fact concerning Smith's false certification; it is indisputable. Thus, the risk of a subsequent determination that Smith's interest, even if one existed, had been deprived erroneously, is very remote.

Second, it is well established that whatever the outcome of an auction, that outcome is subject to judicial review. Thus, Smith is protected. *See, e.g., Auction of IVDS Licenses*, 6 CR 134 (Wireless. Bur. 1997) (licenses awarded at re-auction would be, as a matter of law, subject to the outcome of court cases); *Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 735-36 (D.C. Cir. 1976) (grant of licenses are subject to judicial review and obligation of FCC to give effect to court's judgment).

2. *The Countervailing Interest of the Government.* Permitting an unqualified applicant to participate in an auction would plainly violate the governmental interest in licensing broadcast facilities to parties who can be relied upon to be truthful with the agency that regulates them. Beyond this key factor, allowing the participation of an unqualified applicant virtually guarantees unnecessary delay in the advent of the new broadcast service to the public. A tainted applicant, if it were the high bidder at the auction, obviously could not proceed to become a licensee without *some manner* of additional inquiry into the applicant's character qualifications. That procedure, even if it were defensible on other grounds (and we cannot imagine what such grounds would be) would cause delays that the Viable Settlement Rule would avoid.

C. A Hearing Is Unnecessary.

Under Section 309(a) of the Communications Act, the Commission has the authority to set licensee eligibility standards. *See also*, 47 U.S.C. §309(j)(6)(E). Moreover, the Supreme Court long ago established that *Ashbacker* rights come into play only where screening of the applicants has confirmed their eligibility. *U.S. v. Storer Broadcasting Co.*, 351 U.S. 192 (1956). Because Smith lacks the basic qualifications of a licensee, and has failed to counter the evidence presented by the petitioners, his application may properly be dismissed without a hearing.

III. SETTLEMENTS.

At Paragraph 45 of the *NPRM*, the Commission proposes that permitting settlements at any time prior to the filing of the short-form application is adequate to protect the integrity of the competitive bidding process and is consistent with the anti-collusion rules. Linear concurs with that proposal.

Respectfully submitted,

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